**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMININSTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re: Wendy[[1]](#footnote-1) BSEA #2206283**

**RULINGS ON GUARDIAN’S MOTION TO RECUSE**

This matter comes before the Hearing Officer on Guardian’s *Motion Requesting Administrative Law Judge Recuse Or Reassignment* (*sic*) *This BSEA Hearing* (*Motion*) filed on February 14, 2022. Amherst-Pelham Regional School District (Amherst-Pelham or the District) initially filed its *Hearing Request* regarding Wendy on February 2, 2022, seeking an order that its proposed Individualized Education Program (IEP), dated December 20, 2021 to December 19, 2022, with placement in a private day school, is reasonably calculated to provide her with a free, appropriate public education (FAPE) in the least restrictive environment. The Hearing was scheduled for February 23, 2022.

On February 11, 2022, the District requested postponement of the Hearing due to the unavailability of Counsel. On February 14, 2022, Guardian filed a *Response to District’s Hearing Request and Motion to Dismiss Complaint*. Following a Conference Call that took place on February 15, 2022, the District filed a joint request to postpone the Hearing for three months given the unavailability of Counsel and to permit the parties to work together toward resolution, particularly as Amherst-Pelham would be conducting additional evaluations of Wendy in the near future.[[2]](#footnote-2) The District also requested, and was allowed, an extension to respond to Guardian’s *Motion to Dismiss*; this *Response* was filed on February 23, 2022. The Hearing was postponed for good cause to May 5, 6, and 11, and a Pre-Hearing was scheduled for March 15, 2022.

In the meantime, Guardian, through her advocate, filed the instant *Motion* asserting that her advocate’s involvement in the appeal of an unrelated matter pending before the federal court creates a conflict of interest. Guardian argues that the federal court appeal challenging a decision by this Hearing Officer in the unrelated matter “intertwines her both personally and professionally;” that reassignment is the “only certain way to ensure [advocate is] not prejudice (*sic*) in [her] Federal Appeal;” and that reassignment will protect the interest of all parties involved.

As neither testimony nor oral argument would advance my understanding of the issues involved, I am issuing my ruling on this *Motion* without a hearing, pursuant to BSEA *Hearing Rule* VII(D). For the reasons set forth below, Guardian’s *Motion* is hereby DENIED.

LEGAL STANDARDS FOR RECUSAL

When a party objects to the assignment of a Hearing Officer, that Hearing Officer must consider whether her impartiality might reasonably be questioned; reassignment or recusal is not automatic.[[3]](#footnote-3) Specifically, a BSEA Hearing Officer faced with a Motion to Recuse to must engage in a two-part analysis of whether impermissible bias exists.[[4]](#footnote-4) The first part of this analysis requires that the Hearing Officer examine her conscience and emotions to determine whether she could preside over the matter free from prejudice.[[5]](#footnote-5) The second part requires the Hearing Officer to make an objective, fact-based inquiry as to whether there exists a reasonable basis for the moving party’s concerns regarding her ability to be fair and impartial.[[6]](#footnote-6) The First Circuit has held that a “charge of partiality must be supported by a factual basis,”[[7]](#footnote-7) and that disqualification would be appropriate only if these “facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the [Hearing Officer]’s impartiality.”[[8]](#footnote-8) In the absence of either of these circumstances, a Hearing Officer should not recuse herself.[[9]](#footnote-9)

 Underlying these standards are “twin – and sometimes competing – polic[y]” concerns: first, that courts (and administrative agencies) “must not only be, but must seem to be, free of bias or prejudice . . . [which requires that] the situation . . . be viewed through the eyes of the objective person,” and second, “that a judge [or hearing officer] once having drawn a case should not recuse himself on an unsupported, irrational, or highly tenuous speculation; were he to do so, the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges.”[[10]](#footnote-10)

 Courts have found recusal appropriate where a judge has a “direct, substantial, pecuniary interest in a case,”[[11]](#footnote-11) and where the judge has already determined, as to a party in a criminal case, that his conduct merits charges of perjury or contempt.[[12]](#footnote-12) On the other hand, comments by a judge about previously, publicly-established facts regarding a case (specifically, a comment to a reporter about a factual finding regarding standing that was already in the record) do not merit recusal, nor do previous rulings against a party or orders with which that party disagrees.[[13]](#footnote-13)

ANALYSIS

To engage in the first part of the analysis, I examine my conscience and emotions. After considering Guardian’s concerns, I have concluded that I will be able to preside over this matter without prejudice to any party. I decided the previous, unrelated matter by applying the law to the facts before me. The decision of Guardian’s advocate to exercise her right under the Individuals with Disabilities Education Act (IDEA) to appeal that decision causes me no concern personally or professionally.[[14]](#footnote-14) Therefore I should not recuse myself on this basis.

The second part of this analysis requires that I conduct an objective, fact-based inquiry as to whether this is “a proceeding in which [my] impartiality might reasonably be questioned.”[[15]](#footnote-15) The facts asserted by Guardian are described above: her advocate was involved personally in a previous case I decided in the opposing party’s favor, and her advocate has appealed that case. According to the First Circuit, disqualification would be appropriate only if these “facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting [my] impartiality.”[[16]](#footnote-16) Canon 2 of the Massachusetts Code of Judicial Conduct, pertaining to a judge’s obligations to perform her job impartially, competently, and diligently, provides helpful guidance in a case which, like this one, involves an advocate who appears before the BSEA on a regular basis. The relevant portion includes as a basis for disqualification that the judge “has a personal bias or prejudice concerning a party or a party’s lawyer.”[[17]](#footnote-17)

As I explained above, I decided the prior case, involving Guardian’s advocate, in accordance with my responsibilities as a Hearing Officer. Hearing Officers respect and understand the right of an aggrieved party to appeal an administrative decision as an integral part of due process. I hold no bias or prejudice against Guardian or her advocate for exercising this right. Guardian’s request for reassignment or recusal is speculative; she has offered no basis for her assertion that a conflict of interest exists, other than the pendency of an appeal involving her advocate.

As such, I find that the facts asserted by Guardian in her *Motion* do not provide what a “knowledgeable member of the public would find to be a reasonable basis for doubting the [Hearing Officer]’s impartiality.”[[18]](#footnote-18)

CONCLUSION

For the reasons above, recusal in the above-referenced matter is neither necessary nor appropriate.

**ORDER**

Parent’s *Motion Requesting Administrative Law Judge Recuse or Reassignment* (*sic*) *This BSEA Hearing for Recusal* is hereby DENIED.

By the Hearing Officer:[[19]](#footnote-19)

 /s/ Amy Reichbach

Amy M. Reichbach

Dated: March 1, 2022

1. “Wendy” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in the documents available to the public. [↑](#footnote-ref-1)
2. Guardian, through her advocate, emailed the Hearing Officer on February 24, 2022 to indicate that it was not, in fact, a joint request, but she did not object to the postponement. [↑](#footnote-ref-2)
3. See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (“not every attack on a judge . . . disqualifies him from sitting”); *id*. at 872 (noting that recusal is appropriate where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”). See also 28 U.S.C. 455 (providing that federal justices, judges, and magistrates shall disqualify themselves when they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning a proceeding). [↑](#footnote-ref-3)
4. See *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976). [↑](#footnote-ref-4)
5. See *id.* [↑](#footnote-ref-5)
6. See *Haddad v. Gonzalez*, 410 Mass. 855, 862-63 (1991); *Lena*, 369 Mass. at 575 (internal citations omitted). [↑](#footnote-ref-6)
7. *In Re United States*, 666 F.2d 690, 695 (1st Cir. 1981); see *Ford v. Suffolk County*, 133 F. Supp. 2d 116, 119 (D. Mass. 2001). [↑](#footnote-ref-7)
8. *In Re United States*, 666 F.2d at 695. [↑](#footnote-ref-8)
9. See *Leavitt v. United States Automobile Assoc.*, 2021 WL 135770 at \*1 (2021) (unpublished) (“To avoid delays and a waste of judicial resources, however, unnecessary recusals are to be avoided”). [↑](#footnote-ref-9)
10. *In Re United States*, 666 F.2d at 694 (1st Cir. 1981); see *Ford*, 133 F. Supp. 2d at 121. [↑](#footnote-ref-10)
11. *Caperton*, 556 U.S. at 876 (internal citation omitted) [↑](#footnote-ref-11)
12. See *id*. at 880-81 (noting that the judge’s “prior relationship with the defendant, as well as the information acquired [about the defendant himself and the case during proceedings to determine whether charges should issue] was of critical import”). [↑](#footnote-ref-12)
13. See *Ford*, 144 F. Supp. 2d at 121 ([“t]o hold that my recitation of previously – and publicly-established facts casts doubt on a judge’s impartiality, thereby necessitating recusal, would establish a judicial code of silence that reason cannot bear); *Leavitt*, 2021 WL 135770 at \*1 (2021) (unpublished) (“[Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion”) (citing and quoting *Liteky v. United States*, 510 U.S. 540, 555)). [↑](#footnote-ref-13)
14. See 20 U.S.C. s. 1415(i)(2). [↑](#footnote-ref-14)
15. *Lena*, 369 Mass. at 575 (quotation omitted). [↑](#footnote-ref-15)
16. *In Re United States*, 666 F.2d at 695. [↑](#footnote-ref-16)
17. Massachusetts S.J.C. Rule 3.09, as amended Jan. 1, 2016 (Cannon 2, Rule 2.11(A)(1)). [↑](#footnote-ref-17)
18. *In Re United States*, 666 F.2d at 695. [↑](#footnote-ref-18)
19. The Hearing Officer gratefully acknowledges the research assistance of legal intern Christopher Brosnahan in the preparation of this Ruling. [↑](#footnote-ref-19)